May 5, 1998

In The Matter of:	*	
	*	
Joseph Pisaturo	*	
Claimant	*	Case No.: 98-LHC-0675
	*	
against	*	OWCP No.: 1-140608
	*	
Logistec of Connecticut, Inc.	*	
Employer	*	
	*	
and	*	
	*	
Signal Mutual Indemnity Assoc.	*	
Carrier	*	
	*	
and	*	
	*	
Director, Office of Workers' Compensation Programs, United States Department of Labor	*	
Party-in-Interest	*	

Appearances:

David A. Kelly, Esq.
For the Claimant

John F. Karpousis, Esq.
For the Employer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on February 12, 1998 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for

a Director's exhibit, LX for an exhibit offered by Logistec[1] and RX for an exhibit offered by New Haven Terminal. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence consists of the following:

Exhibit Number	**Item**	**Filing Date**
LX 6	Attorney Karpousis' letter filing the	02/19/98
LX 7	Form LS-207, dated May 19, 1997	
CX 8	Attorney Kelly's Fee Petition	03/23/98
LX 8	Attorney Karpousis' letter filing the	03/30/98
LX 9	March 4, 1998 Deposition testimony of David I. Astrachan, M.D.	03/30/98
LX 10	Attorney Karpousis' objections to the fee petition	03/30/98
CX 9	Attorney Kelly's letter regarding the procedural status of the case	04/22/98
LX 11	Attorney Karpousis" letter filing the	04/30/98
LX 12	Employer's, Logistec of Connecticut, Inc. Post Trial Brief and the	04/30/98
LX 13	February 2, 1998 Deposition Testimony of Marcia Cornell and the	04/30/98
LX 14	January 5, 1998 Deposition Testimony of Marcia Cornell	04/30/98

The record was closed on April 30, 1998 as no further documents were filed.

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[1] New Haven Terminal Corporation and its Carrier, AIG Claims Services, have been dismissed herein pursuant to the so-called **Cardillo** rule. (TR 20-21)

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant suffered an injury in the course and scope of his employment which consists of a 11.154 percent binaural hearing loss.

4. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

5. The parties attended an informal conference on April 15, 1997.

6. The applicable average weekly wage is $914.79.

7. The Employer and Carrier have paid neither compensation nor medical benefits as of the date of the hearing.

8. On July 12, 1996, Logistec of Connecticut, Inc., assumed legal control over New Haven Terminal Corporation and since that time Signal Mutual Indemnity Association has provided insurance coverage under the Act for Logistec. Prior thereto, New Haven Terminal was covered under the Act by AIG Claims Services. (TR 7-11)

The unresolved issues in this proceeding are:

1) The extent of Claimant's current hearing loss.

2) The extent of any pre-employment hearing loss.

3) The applicability of Section 8(f).

For the reasons stated herein, this Court finds that the Employer had timely notice of Claimant's hearing loss and that Claimant filed a timely claim for compensation. This Court further finds that Claimant presently suffers from a 11.154 percent binaural hearing loss arising out of and in the course of his employment and that the Employer is not only responsible for the benefits awarded herein, but is not entitled to Section 8(f) relief in mitigation of that obligation.

Summary of the Evidence

Joseph Pisaturo (“Claimant”) herein), thirty-eight (38) years

of age, with an eighth grade education and an employment history of manual labor, began working in 1982 as a laborer at the new Haven terminal of the New Haven Terminal corporation ("NHT"), a stevedoring firm which provides laborers to load/unload cargo from ocean-going vessels at New Haven and Bridgeport, Connecticut, maritime facilities adjacent to the navigable waters of Long Island Sound and the Atlantic Ocean. As a laborer, Claimant worked mainly in the holds of the vessels and, according to Claimant, the holds are very noisy areas as the loud sounds just seemed to reverberate and bounce off the walls. He was daily exposed to not only the loud noises that he generated as a result of his own work activities but also to the loud noises generated by his nearby co-workers. (TR 22-24; LX 1)

As noted, Logistec of Connecticut, Inc. (LGT) assumed control of NHT on July 12, 1996 and LGT proceeded to give all of the employees an employment related physical examination and a hearing test. Claimant's employment hearing test (LX 2) was administered and this test revealed a binaural hearing loss.

On behalf of the Claimant, the September 16, 1996 medical report of Dr. Mohammed Saud Anwar was introduced. (CX 2) Dr. Anwar reviewed an audiogram performed on Claimant at his clinic. This audiogram, which is dated August 30, 1996 (CX 3), revealed a 19.062 percent binaural hearing loss which Dr. Anwar opined was sensorineural in nature and was consistent, in part, with employment-related noise exposure. Dr. Anwar based this opinion on the Claimant's history report, the physical examination and his review of Claimant's audiogram. (CX 2; TR 15-16)

On behalf of LGT, the October 29, 1997 medical report of Dr. David I. Astrachan was introduced. (LX 4-1) Dr. Astrachan reviewed Claimant's audiogram (LX 4-3) which revealed a 4.40 percent binaural hearing loss. Dr. Astrachan opined that this impairment is high frequency and sensorineural in nature and attributed this loss, in part, to Claimant's employment as a stevedore. (LX 4-2)

On behalf of NHT, that Employer has offered the March 31, 1997 report of Dr. William Lehman, a Board-Certified Otologist, wherein the doctor, after reviewing the audiogram performed at the doctor's office, opined that the audiogram demonstrated a ten (10%) percent binaural hearing loss and that such "hearing impairments and hearing handicap were the result of noise induced hearing loss sustained while employed as a longshoreman." (RX 1)

On the basis of the totality of the record and having observed the demeanor and having heard the testimony of a credible Claimant, this Court makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1968); **Todd Shipyards v. Donovan**, 300 F.2d 741(5th Cir. 1962); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

I. Notice and Timeliness of Claim

Under the 1984 Amendments to the Act, in hearing loss cases the time for filing a notice of injury under Section 12 and a claim for compensation under Section 13 does not begin to run until the employee has received an audiogram and a report indicating that he has suffered a work-related hearing loss. Section 8(c)(13)(D) as amended by P.L. 98-426, enacted September 28, 1984. **Mauk v. Northwest Marine Iron Works**, 25 BRBS 118 (1991); **Fucci v. General Dynamics Corp., 23 BRBS 161 (1990); Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in part**, **rev'd in part and remanded sub nom. Ingalls Shipbuilding v. Director, OWCP**, 898 F.2d 1088 (5th Cir. 1990), **Rehearing En Banc denied**, 904 F.2d 705 (June 1, 1990); **Machado v. General Dynamics Corp.**, 22 BRBS 176 (1989); **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Macleod v. Bethlehem Steel Corp.**, 20 BRBS 234 (1988). **See also Alabama Dry Dock and Shipbuilding Corporation v. Sowell**, 933 F.2d 1561, 24 BRBS 229 (11th Cir. 1991).

Claimant’s hearing acuity was tested by Dr. Anwar, at the Yale University Occupational Health Clinic (OHC) on August 29, 1996 and he learned of his hearing impairment on the date of this examination. He received a copy of the audiogram and the doctor's report on or about September 16, 1996. (TR 24; CX 2) The notice and filing periods in this case, thus, began to run on September 16, 1996. Claimant's claim for benefits is dated October 10, 1996. (CX 1) Clearly, the requirements of Sections 12 and 13 have been satisfied by Claimant. **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301 (1989); **Fucci, supra**; **Fairley, supra**; **Machado, supra**; **Grace, supra**; **Macleod, supra**.

II. Nature and Extent of Disability

A. Causal Connection

The Claimant must allege an injury which arose out of and in the course of his employment. **U.S. Industries v. Director, Office of Workers' Compensation Programs**, 455 U.S. 608, 102 S.Ct. 1312 (1982). The term "arose out of" refers to injury causation. (**Id.**) The Claimant must allege that his injury arose in the course of his

employment as the Section 20 presumption does not substitute for allegations necessary for Claimant to state a **prima facie** case. (**Id.**)

The medical evidence before this Court clearly establishes that Claimant suffered a hearing loss arising out of and in the course of his work at the Employer's shipyard. Dr. Anwar, based upon Claimant's personal history and upon a physical examination, during which an audiogram was administered, opined that Claimant suffered from a sensorineural hearing loss in both ears which was consistent, in part, with noise-induced loss and due to employment-related noise exposure. (CX 2)

On behalf of the LGT, the medical report of Dr. David I. Astrachan was introduced. Dr. Astrachan, after conducting a physical examination, which also included an audiogram, opined that Claimant "has suffered a degree of noise induced sensorineural hearing loss and that this loss has occurred because of his long history of noise exposure." (LX 4-2)

As already noted, NHT's medical expert, Dr. William B. Lehmann, has opined that Claimant's March 24, 1997 audiogram reflects a ten (10%) percent binaural hearing loss. (RX 1-3)

The well-reasoned and well-documented reports of Drs. Anwar, Astrachan and Lehmann, together with Claimant's testimony and the lack of evidence of non-employment related exposure to noise, demonstrate a causal connection between Claimant's hearing impairment and his work at the Employer's shipyard. This Court thus finds that Claimant has satisfied the rule in **U.S. Industries, supra**, and that the LGT responsible for Claimant's work-related hearing loss. **See Fucci v. General Dynamics Corp.;** 23 BRBS 161 (1990); **McShane v. General Dynamics Corp.**, 22 BRBS 427 (1989); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301 (1989).

While the record reflects that Claimant had some degree of hearing loss at the time he was retained in employment by LGT on July 12, 1996 (LX 2), it is well-settled that the Employer takes its workers "as is," with all the human frailties, and the Employer is responsible for the combination or aggravation of such pre-existing disability with a subsequent work-related injury subject, of course, to the limiting provisions of Section 8(f) in appropriate situations. Moreover, while Claimant's hearing loss is due to both employment-related noise exposure and to non-employment related factors, it is well-settled that the Employer is liable for Claimant's entire binaural hearing loss. **Epps v. Newport News Shipbuilding and Dry Dock Company**, 19 BRBS 1 (1986); **Worthington v. Newport News Shipbuilding and Dry Dock Company**, 18 BRBS 200 (1986). Furthermore, the Board has held that the aggravation rule does not permit a deduction from Employer's liability in hearing loss cases for the effects of presbycusis (**i.e.**, hearing loss due to the aging process). **Ronne v. Jones**

Oregon Stevedoring Company. 22 BRBS 344 (1989), **aff'd in pertinent part and rev'd on other grounds sub nom. Port of Portland v. Director, OWCP**, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991).

Thus LGT is responsible for all of Claimant's current hearing loss subject, of course, to Section 8(f) relief if the tri-partite requirements are satisfied.

B. Degree of Hearing Loss

The 1984 amendments provide that an audiogram "shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof . . ." if it was administered by a licensed or certified audiologist or a physician certified in otolaryngology, was provided to the employee at the time it was performed, and if no contrary audiogram made at the same time (or within thirty (30) days thereof) is produced. Section 8(c)(13)(C) as amended. **See Manders v. Alabama Dry Dock and Shipbuilding Corp.**, 23 BRBS 19 (1989); **Gulley v. Ingalls Shipbuilding, Inc.** 22 BRBS 262 (1989), **aff'd in part, rev'd in part and remanded sub nom. Ingalls Shipbuilding v. Director, OWCP**, 898 F.2d 1088 (5th Cir. 1990), **Rehearing En Banc denied**, 904 F.2d 705 (June 1, 1990).

Regarding Claimant's present hearing loss, three audiograms appear in the record. On August 30, 1996, Claimant's hearing was tested by a certified audiologist at OHC. Claimant received a copy of these results through the doctor. (CX 2) Thus, the audiogram meets the requirements of Section 8(c)(13)(C) and is deemed presumptive evidence of the extent of Claimant's hearing loss as of August 30, 1996.

The results calculated under the JAMA standard are:

August 30, 1996 (CX 3-5)

	Left Ear		**Right Ear**
500 Hz	35 db		25 db
1000 Hz	40		35
2000 Hz	40		45
3000 Hz	35		50
Monaural	18.75%		20.625%
Binaural		19.062%	

Claimant has alleged and this Court verifies that the JAMA interpretation of this audiogram reveals a 19.062 percent binaural hearing loss. (TR 10)

The record also contains an audiogram of a hearing test reviewed on October 29, 1997 by Dr. Astrachan (LX 4-1) A report of this audiogram also was given to Claimant through his attorney. Thus, the audiogram meets the requirements of Section 8(c)(13)(C)

and is deemed presumptive evidence of the extent of Claimant's hearing loss as of October 29, 1997. The results calculated under the JAMA standard are:

October 29, 1997 (RX 5)

	Left Ear		**Right Ear**
500 Hz	20 db		20 db
1000 Hz	25		25
2000 Hz	35		35
3000 Hz	30		40
Monaural	3.80%		7.50%
Binaural		4.40%	

Dr. Astrachan has opined that the resulting binaural hearing loss of Claimant, as evidenced by this audiogram, is 4.40 percent. (RX 5-1)

The record also contains an audiogram of a hearing test reviewed on March 31, 1997 by Dr. Lehmann, a Board-Certified Otologist, and the doctor opined that Claimant's March 24, 1997 audiogram reflected a ten (10%) percent binaural hearing loss. Claimant received a copy of these results through his attorney. (RX 1) Thus, this audiogram meets the requirements of Section 8(c)(13)(C) and is deemed presumptive evidence of the extent of Claimant's hearing loss as of August 30, 1996. The results calculated under the JAMA standard are:

March 24, 1997 (RX 1-6)

	Left Ear		**Right Ear**
500 Hz	30 db		25 db
1000 Hz	30 db		30 db
2000 Hz	35 db		40 db
3000 Hz	30 db		40 db
Monaural	9%		15%
Binaural		10%	

The parties found it most rational to average the results of the August 30, 1996, March 24, 1997 and October 29, 1997 audiograms, Claimant's most recent hearing tests, and thereby stipulated that Claimant presently suffers from a 11.154 percent binaural hearing loss. (TR 10) This Court agrees and accordingly accepts the parties' stipulation because both tests show the same indicia of reliability as both were conducted by personnel certified to perform hearing tests and the results were analyzed by physicians. The Court is cognizant that the subjective elements of audiograms prevent any particular test from being absolutely accurate, thus, it allows for a margin of error by sanctioning the averaging of the three tests, as this method helps to resolve all

doubts in Claimant's favor. I note that Dr. Lehmann has opined that Claimant's audiograms of August 1, 1996, August 30, 1996 and March 24, 1997 "are in good agreement with each other." (RX 1-1)

C. **Entitlement**

Claimant is entitled to compensation for his hearing loss under the 1984 Amendments to the Longshore and Harbor Workers' Compensation Act. Section 10(i) provides that Claimant's time of injury and average weekly wage shall be determined using the date on which the Claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his employment, his hearing loss and his disability. The date of onset for payment of Claimant's benefits is the date the evidence of record first demonstrates a permanent hearing loss. **Howard v. Ingalls Shipbuilding, Inc.**, 25 BRBS 192 (1992).

For purposes of Section 8(c)(13) and his hearing loss, the date of Claimant's injury is the date of manifestation. The record reflects that Claimant received a copy of the report on or about September 16, 1996 and that he filed a claim on or about October 10, 1996 of Dr. Anwar (CX 2-2). Moreover, Claimant continued working and continues to work at the Employer's facility. (TR 23) Thus, the Court finds September 16, 1996 to be the date Claimant learned that his disability was work-related and the date of manifestation for Section 8 purposes. This Court additionally concludes that Claimant's average weekly wage is $914.79, as stipulated by the parties and corroborated by the record. (TR ; LX 3; RX 2) **Fucci** , **supra**; **Fairley**, **supra**; **Grace**, **supra**.

Since Claimant was still working when he filed his claim, he is entitled to a scheduled award under Section 8(c)(13). Claimant's binaural hearing loss entitles him to compensation paid at the rate of 66 2/3 percent of his average weekly wage of $914.79 multiplied by his 11.154 percent binaural hearing loss, commencing on September 16, 1996, the date of manifestation. **Macleod v. Bethlehem Steel Corporation**, 20 BRBS 234, 237 (1988). **See also Fucci, supra**.

III. Medical Benefits

Claimant is entitled to medical benefits under Section 7 of the Act for reasonable, necessary and appropriate expenses related to his loss of hearing. The record establishes that Claimant's hearing test was administered on August 30, 1996 when he saw Dr. Anwar to have his hearing acuity evaluated and he then filed his claim on or about October 10, 1996. The expenses of these visits, for the audiogram (CX 3-5) and for Dr. Anwar's evaluation (CX 2), will be paid by the Employer as a necessary litigation expense under Section 7. (CX 4, CX 5, CX 6) Claimant is also entitled to reasonable, necessary and appropriate future medical benefits for

his hearing impairment, including hearing aids, if necessary, subject to the provisions of Section 7 of the Act. I note that Dr. Astrachan has opined that Claimant is in need of binaural hearing aids. (TR 12)

IV. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, **aff'd in pertinent part and rev'd on other grounds sub nom**. **Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46, 50 (1989). The Board concluded that inflationary trends in our economy have rendered a fixed six (6) percent rate no longer appropriate to further the purpose of making claimant whole, and held that the fixed six (6) percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills. **Grant v. Portland Stevedoring Co.**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3rd Cir. 1978); **Gulley, supra**; **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1986); **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a Notice of Controversion (Form LS-207) is filed with the Deputy Commissioner on the date of the informal conference, whichever is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th

Cir. 1979); **National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980).

The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 79 (1985); **Rose v. George A. Fuller Company**, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring). **See also Fairley, supra**.

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as LGT's Notice of Controversion (LX 7) is dated May 19, 1997 and Claimant's claim for compensation (CX 1), dated October 10, 1996, was received by the Employer on October 23, 1996. (LX 7) Accordingly, Claimant is entitled to an award of additional compensation, pursuant to Section 14, on those installments due between September 16, 1996 and April 15, 1997, the date of the informal conference (TR 14), as the Form LS-207 was not filed until sometime after May 19, 1997. (LX 7)

VI. Limitation of Liability

Regarding the Section 8(f) issue, the Employer is entitled to such relief if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the Employer and (3) which combined with the subsequent injury to produce a greater degree of permanent disability. **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir 1977); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Co.**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The 1984 Amendments to the Longshore Act have now made it possible for an employer to seek contribution from the Special Fund for the employee's pre-employment hearing loss to the extent that such loss existed at the time of hiring, retention or re-hiring by the maritime employer. Ordinarily, the obligation of the Special Fund to pay compensation benefits does not arise until after one hundred and four (104) weeks of permanent disability have elapsed. However, Congress has now mandated that the Fund is responsible for the employee's pre-employment or pre-existing hearing loss even if

the Employer's obligation for benefits is less than one hundred and four (104) weeks. **See** Section 8(f)(1); Conference Report, H.R. 98-1027, 98th Cong. P.L. 98-426, pg 8. **See also Strachan Shipping Co. v. Nash**, 751 F.2d 1460 (5th Cir. 1985), **aff'd in pertinent parts on reh. en banc**, 782 F.2d 513 (5th Cir. 1986); **Balzer v. General Dynamics Corp.**, 22 BRBS 447 (1989), **Decision and Order on Motion for Reconsideration En Banc**, 23 BRBS 241 (1990); **McShane v. General Dynamics Corp.**, 22 BRBS 427 (1989); **Risch v. General Dynamics Corp.**, 22 BRBS 251 (1989); **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 900 F.2d 506 (2d Cir. 1990). Under Section 8(f) as amended in 1984, where benefits are awarded under Section 8(c)(13), the employer is liable only for the lesser of one hundred and four (104) weeks or the period attributable to the subsequent injury. **Fucci v. General Dynamics Corp.**, 23 BRBS 161, 164 (1990). Moreover, audiograms taken during the course of employment may be considered if thereafter the employee continues to be exposed to injurious levels of shipyard noise and the employer establishes that the continued exposure aggravated claimant's hearing loss. (**Id.** at 165)

LGT has submitted an audiogram contained in Claimant's August 1, 1996 pre-employment physical examination reports. The audiogram was performed on August 1, 1996 (LX 2) upon Claimant's retention in employment. Counsel for Employer states in the post-trial brief (LX 12) that the audiogram was administered by Bradford Hawley under the supervision of Marcia Cornell. The audiogram of August 1, 1996 revealed a binaural hearing loss of 21.26%. Mr. Pisaturo was given that audiogram at work which the Employer concedes could have created a temporary threshold shift. (LX 12, pgs. 5, 9-10) The fact that Mr. Pisaturo may have been exposed to injurious stimuli causing a temporary threshold shift prohibits and prevents the audiogram from being accurate. Thus, in my judgement, the Logistec audiogram is not reliable because this Court can not determine the Claimant’s hearing loss as of that date.

In support of its Section 8(f) petition, Logistec has offered the employment-related audiogram of the Claimant taken on August 1, 1996 at the New Haven Terminal, now known as Coastline Terminals. (TR 23) Logistec has also offered the March 4, 1998 deposition testimony (LX 9) of David I Astrachan, M.D., a Board-Certified ear, nose and throat physician since 1989. Dr. Astrachan, who has been certified as an expert in his field of specialty in other proceedings presided over by this Administrative Law Judge, examined Claimant on October 29, 1997 and the doctor, after the usual social and employment history, the physical examination and his review of Claimant’s four audiograms, opined that Claimant suffered from a noise-induced employment hearing loss prior to his joining Logistec on July 12, 1996, an opinion based upon Claimant’s August 1, 1996 Logistec audiogram which reflected a 19.10 percent binaural hearing loss, a loss which the doctor “term(ed) a mild sensorineural hearing loss.” (LX 9 at 3-10)

Dr. Astrachan agreed that that so-called “screening” test at Logistec, administered in a mobile van unit somewhere at the terminal, is not as thorough and accurate as a full clinical evaluation which consists of more tests than just the so-called pure tone testing done at the terminal. According to the doctor, the August 1, 1996 “(a)bsolutely” shows a hearing loss, that all of that hearing loss was not caused by Claimant’s exposure to loud noises at the terminal between July 12, 1996 and August 1, 1996, that such loss was caused by “the cumulative years (of) relevant work and noise exposure” and that Claimant’s hearing loss constituted a pre-existing permanent partial disability on and prior to August 1, 1996. (LX 9 at 10-12).

Dr. Astrachan is aware of the study by Dr. Joseph T. Sataloff, a noted ENT physician from Philadelphia, but Dr. Astrachan is “not formally conversant (with) that study,” wherein the doctor articulates a thesis that the daily exposure to loud noises, above a certain decibel level, for eight hours daily results in a fully perfected hearing loss after ten (10) years and that any further exposure thereafter is not injurious. (LX 9 at 12) This Administrative Law Judge has consistently rejected that thesis as not sanctioned by the so-called **Cardillo** rule and by Board and Appellate Court precedents. Moreover, the U.S. Supreme Court has also rejected that thesis by holding that a hearing loss is fully perfected as of the date of last exposure to the loud noises, whether such exposure lasts one year, fifteen years, thirty or forty years. In this regard, **see Bath Iron Works Corporation v. Director, OWCP. (Brown),** 506 U.S. 153, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993).

Dr. Astrachan agreed that the bulk of Claimant’s hearing loss occurred during the first ten or fifteen years of his employment with NHT. Dr. Astrachan opined that the hearing test conducted by Ms. Diantha Morse at the request of Dr. Lehmann is “excellent” and the results of the audiograms in these cases are “consistent” as well. While Dr. Lehmann’s audiogram shows a ten (10%) percent binaural hearing loss, Dr. Astrachan opined that all of that 10 percent loss was due to Claimant’s terminal work prior to July 12, 1996 because the August 1, 1996 audiogram shows a 21.26 percent binaural hearing loss. I also note that the doctor further testified that “(c)ertainly continued noise exposure would be expected to cause further problems” and that “(a)ny noise exposure subsequent would exacerbate his hearing loss.” (LX 9 at 14-18)

In the event that reviewing authorities should hold that the August 1, 1996 audiogram is somehow reliable, I shall now resolve the merits of that audiogram.

The 1984 Amendments provide that audiogram results shall be calculated according to the JAMA standard. Section 8(c)(13)(E); **Reggiannini v. General Dynamics Corp.**, 17 BRBS 254 (1985). The JAMA standard uses the values obtained at 500, 1,000, 2,000 and

3,000 hertz. The formulas then applied to determine the degree of hearing loss are as follows:

monaural loss = [(average of results at specified levels)- 25 x 1.5]
binaural loss = [(5 x smaller monaural loss) + larger monaural loss divided by 6]

The results of the pre-employment audiogram, calculated under the JAMA standard, are as follows:

August 1, 1996 (LX 2)

	Left Ear		**Right Ear**
500 Hz	35 db		35 db
1000 Hz	40		45
2000 Hz	40		45
3000 Hz	40		40
Monaural	20.63%		24.38%
Binaural		21.26%	

In view of the fact that Claimant commenced employment at LGT's facility in 1982, and still is employed at the Employer's shipyard, this Court concludes that Claimant's August 1, 1996 (LX 2) audiogram may be representative of Claimant's pre-existing hearing impairment, and that such pre-existing loss is 21.26 percent, binaural.

Although the Director was given the opportunity by this Court on July 8, 1997 (ALJ EX 1) to file a brief pertaining to the applicability of Section 8(f), the Director filed no substantive comments. As the Employer timely filed a Section 8(f) petition, it is entitled to Section 8(f) relief and there is no bar to this entitlement as the Director was on notice of this Section 8(f) request as of April 15, 1997 (EX ALJ 2) and again was notified on June 24, 1997. (ALJ EX 6)

The Employer now suggests that I ascribe the 10% binaural hearing loss determined by Dr. Lehman as the degree of Claimant's pre-employment hearing loss. That 10% binaural hearing loss is Claimant's hearing loss as of that point in time, i.e. the date of the examination by Dr. Lehman. Employer's request that I extrapolate the loss is not permitted by § 8(f), the applicable regulations and pertinent Benefits Review Board and appellate court decisions. As noted above, Claimant's August 1, 1996 audiogram shows a 21.26 percent binaural hearing loss, representing an exaggerated hearing loss as Claimant apparently was working and was exposed to loud noises just prior to the hearing test, as opposed to waiting the traditional fourteen (14) hours prior to taking a hearing test, and as the parties have compromised Claimant's current loss to 11.154% binaural and as the highest of the three

remaining audiograms taken thereafter reflects a 19.062% binaural hearing loss, the two other audiograms reflecting 10% and 4.40%, the Employer is not entitled to the limiting provisions of Section 8(f) as this closed record does not reflect an increase in the hearing loss between August 1, 1996 and August 30, 1996. Moreover, the parties' compromise herein by averaging the results of the three subsequent audiograms can in no way implicate or bind the parties without the express approval of counsel for the Special Fund.

VII. Responsible Employer

The Employer as a self-insurer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Appropriate benefits for the hearing loss are payable by the employer during the last maritime employment in which the claimant was exposed to the injurious stimuli, **i.e.**, loud and excessive noise, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising

naturally out of his employment. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d. Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). The "awareness" component of the **Cardillo** standard is in essence identical to the "awareness" requirement in Sections 12 and 13 of the Act.

The Board has consistently held that the time of awareness for purposes of the last employer rule must logically be the same as awareness for purposes of the provisions of Sections 12 and 13 of the Act. **See**, **e.g.**, **Grace v. Bath Iron Works Corp.**, 21 BRBS 244, 247 (1988).

As indicated above, in hearing loss cases, the responsible employer is the employer during the last employment in which claimant was exposed to injurious stimuli prior to the date claimant receives an audiogram showing a hearing loss, and has knowledge of the causal connection between his work and his hearing loss. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205, 208 (1985).

Courts and the Board have consistently followed the **Cardillo** standard because apportionment of liability between several maritime employers is not permitted by the Act. **See**, **e.g.**, **General Ship Service v. Director, OWCP (Barnes)**, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991); **Ricker v. Bath Iron Works Corp.**, 24 BRBS 201 (1991) (the last maritime employer is still responsible for benefits even if the firm is out of business and there may be no insurance coverage under the Act); **Brown v. Bath Iron Works Corp.**, 22 BRBS 384 (1989), **aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP**, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), **aff'd,** 113 S.Ct. 692 (1993).

The so-called **Cardillo** rule holds the claimant's last maritime employer liable for all of the compensation due the claimant, even though prior employers of the claimant may have contributed to the claimant's disability. This rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since "all employers will be the last employer a proportionate share of the time." **General Ship Service**, **supra**, 938 F.2d at 962, 25 BRBS at 25. The purpose of the last employer rule is to avoid the complexities of assigning joint liability and it is apparent that Congress intended that the last employer be completely liable because of the difficulties and delays which would inhere in the administration of the Act if attempts were made to apportion liability among several responsible employers. **Todd Shipyards v. Black**, 717 F.2d 1280, 1285, 16 BRBS 13, 16 (CRT) (9th Cir. 1983), **cert. denied**, 466 U.S. 937 (1984). Moreover, the last employer rule is not a valid defense where a subsequent employer not covered by the Act also contributed to the occupational disease. **Black**, **supra**, 16 BRBS at 17 (CRT).

The Board approved the holding of the judge who found as more reliable the 1988 medical evidence because it included an audiogram and the identity of the test administer, a certified audiologist, who opined that the 1988 test was more complete since it reflected all of claimant's hearing impairment. **Dubar v. Bath Iron Works Corp.**, 25 BRBS 5 (1991); **Labbe v. Bath Iron Works Corp.**, 24 BRBS 159 (1991); **Brown v. Bath Iron Works Corp.**, 24 BRBS 89 (1990), **aff'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP (Brown)**, 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), **aff'd**, 113 S.Ct. 692 (1993).

As noted above, Logistic of Connecticut, Inc. (Employer II or Logistec) assumed control of the operations and assets of New Haven Terminal on August 1, 1996 and immediately took steps to give physical examinations and hearing tests to its employees. Claimant’s test took place on July 29, 1996 and that audiogram has already been rejected by this Administrative Law Judge as support for the Employer’s Section 8(f) petition and, for the same reasons, cannot establish that Claimant had a hearing loss as of that date. Claimant continued to be exposed to the loud noises on a daily basis as a maritime employee at the terminal and such exposure continued until May 9, 1997, the date of injury. As Logistec was Claimant’s employer at that time and, as apportionment of liability among competing maritime employers who have exposed Claimant to the loud noises, is not permitted under the Act, New Haven Terminal Corporation bears no responsibility herein, pursuant to the well-settled and so-called **Cardillo** rule, and Logistec and its Carrier, Signal Mutual Indemnity Association, are responsible for all of the benefits awarded herein.

The **Cardillo** rule has been strengthened by the 1984 Amendments to the Longshore Act and I cannot accept Logistec’s thesis as that would, in effect, vitiate the purposes of the **Cardillo** rule. In this regard, **see Port of Portland v. Director, OWCP, (Ronne)**, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991); **Roberts v. Alabama Dry Dock and Shipbuilding**, 30 BRBS 229 (1997); **Good v. Ingalls Shipbuilding**, 26 BRBS 159 (1992); **Barnes v. Alabama Dry Dock & Shipbuilding**, 17 BRBS 188 (1933).

I note that Employer II submits that Employer I, pursuant to 20 CFR §702.441(c), is responsible for Claimant’s hearing loss as the majority of the loss occurred while Claimant worked for Employer I. However, that is not the import of that cited regulation as it was promulgated to apportion liability between the employer and Special Fund for a pre-existing permanent partial disability in the form of a hearing loss and as it in no way determines the ultimate responsibility for such loss. Such liability is determined by the so-called Cardillo rule, the judicially-imposed rule of pragmation, without which there would be a trial within the trial, as has happened in this case. A routine hearing loss claim has been transformed into complex and lengthy litigation, even though the U.S. Supreme Court has resolved these

legal issues in several cases.

As this case arises within the jurisdiction of the U.S. Court of Appeals for the Second Circuit, I must follow the **Cardillo** rule.

As noted, that rule is one of judicial pragmatism, without which there would be a trial within a trial, as happened therein when Employer II offered the testimony of an acoustical engineer to establish, **inter alia**, compliance with OSHA Regulations. While Mr. Bragg's testimony might have been persuasive to one of my colleagues from OSHRC, my task is not to determine compliance with a Regulation which holds, for example, that noise levels above 90db for an eight-hour period is injurious. The OSHRC judge will resolve that issue and, in this proceeding Employer II submits that I should hold a noise level of 89db or less somehow is not injurious to one's heaving acuity based upon that regulation.

The Longshore Act does not countenance apportionment of liability among competing maritime employers. The **Cardillo** rule does not countenance apportionment and I shall not countenance apportionment between Employer I and Employer II on the factual scenario presented herein.

Moreover, Employer II, concedes that Claimant was exposed to loud noises between July 12, 1996 and August 1, 1996. (LX 9 at 10-13)

VIII. Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the LGT. Claimant's attorney filed a fee application on March 23, 1998 (CX 8), concerning services rendered and costs incurred in representing Claimant between April 21, 1997 and March 9, 1998. Attorney David A. Kelly seeks a fee of $3,211.50 based on 15.70 hours of attorney time at $195.00 per hour and 3 hours of paralegal time at $50.00 per hour.

The Employer has objected to the requested attorney's fee as excessive in view of the benefits obtained, the hours itemized and the hourly rate charged. (LX 10)

In accordance with established practice, I will consider only those services rendered and costs incurred after April 15, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

The Employer requests a substantial modification of the fee petition. However, I disagree because such reduction is not realistic at this time, especially in contingent litigation where the attorney's fee is dependent upon successful prosecution. Such

a fee if adopted in these claims, would quickly diminish the quality of legal representation. While the parties compromised the extent of Claimant's current hearing loss, such was not done until just before the hearing was to be convened. In fact, the start of the hearing was delayed to permit the parties to discuss the procedural posture of the case. Until that time, this claim was vigorously defended by both Employers and Claimant's counsel was in the position of prosecuting the claim against two Employers, thereby, in effect, doubling, to a certain extent certain of the services performed. This Claim has been successfully prosecuted with a most reasonable number of hours and the fee petition as filed is hereby approved.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the length of time this claim has been pending, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $3,211.50 is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Logistec of Connecticut, Inc. and Signal Mutual Indemnity Association ("Respondents") shall:

a) pay Claimant appropriate compensation, commencing on September 16, 1996, for his 11.154 percent work-related binaural hearing loss, based upon his average weekly wage of $914.79, such compensation to be computed pursuant to Section 8(c)(13)(B).

b) furnish Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related hearing loss referenced herein may require, including hearing aids if necessary, even after the expiration of the time period specified in Order provision 1(a), subject to the provisions of Section 7 of the Act.

2. The Respondents shall pay Claimant interest on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. The Respondents shall also pay Claimant, pursuant to Section 14, additional compensation on those installments due between September 16, 1996 and April 15, 1997, the date of the informal conference.

4. The Respondents shall pay to Claimant's attorney, David A. Kelly, a reasonable legal fee of $3,211.50 for representing Claimant herein before the Office of Administrative law Judges between April 21, 1997 and March 9, 1998.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:gcb